KCC 4982.1 (K-C 19,834)
PATENT

**REMARKS**

After entry of this Amendment D, claims 1, 3, 5-13, 15-23, 25, and 27 will be pending. Applicants have amended claims 1 and 23. Specifically, claims 1 and 23 have been amended to require the emollient to be present in the topical ointment in an amount of from about 30% by total weight of the ointment to about 80% by total weight of the ointment and the structurant to be present in the topical ointment in an amount of from about 20% by total weight of the ointment to about 40% by total weight of the ointment. Support for the above amendments can be found in previously presented dependent claims 2 and 4 and in the instant specification on page 6, paragraph 20 and page 8, paragraph 24. No new matter has been added by these amendments. Applicants respectfully request reconsideration and allowance of all pending claims.

1. Rejection of Claims 1-13, 15-18, 21, and 27 under 35 U.S.C. §103(a).

Claims 1-13, 15-18, 21, and 27 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over EP 0497144 ('144) in view of Morrison (U.S. 6,340,467) and further in view of Grollier et al. (U.S. 4,925,653).

Claim 1, as amended herein, is directed to a topical ointment comprising from about 30% by total weight of the ointment to about 80% by total weight of the ointment of an emollient, from about 20% by total weight of the ointment to about 40% by total weight of the ointment of a structurant, and from about 0.1% by total weight of the ointment to about 40% by total weight of the ointment of a rheology enhancer. The rheology enhancer is selected from the group consisting of

polyisobutylene; hydrogenated polyisobutene and butylene/ethylene/styrene copolymers; hydrogenated polyisobutene and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isononyl isononanoate and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isododecane and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isohexadecane and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; isopropyl palmitate and ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers; and combinations thereof.

The '144 reference discloses cosmetic compositions comprising a particulate styrene-ethylene-propylene copolymer; an emollient selected from the group consisting of isododecane, a $C_9$-$C_{12}$ aliphatic hydrocarbon, a $C_9$-$C_{12}$ isoparaffin, a mineral oil, isotetracosane, an ester made from a $C_3$-$C_{12}$ alcohol and a $C_3$-$C_{18}$ carboxylic acid, and mixtures thereof; and a third component selected from the group consisting of a colorant, a sunblock agent, and mixtures thereof. The particulate styrene-ethylene-propylene copolymer is present in the composition in an amount of from 0.5% by weight to 90% by weight, and more preferably, from 1.0% by weight to 25% by weight. The emollient is present in the composition in an amount of from 10% by weight to 90% by weight, and more preferably, from 10% by weight to 70% by weight. If the third component includes a colorant, the colorant is present in the composition in an amount of from 1.0% by weight to 85% by weight, and more preferably, from 5% by weight to 50% by weight. If a sunblock agent is present in the composition, the sunblock agent is present in the composition in an amount of from 0.50% by weight to 90% by weight.

Significantly, the '144 reference fails to disclose the specific rheology enhancers as required by claim 1. At best, the rheology enhancers disclosed in the '144 reference include isododecane in combination with styrene-ethylene-propylene copolymers. As noted above, however, in Applicants' claim 1 when the rheology enhancer includes isododecane, the isododecane is used in combination with ethylene/propylene/styrene copolymers and butylene/ethylene/styrene copolymers. No where in the '144 reference is the use of butylene/ethylene/styrene copolymers taught or suggested.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art references must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the references, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under number (1) above, as the cited references, alone or in combination, have not taught or suggested all of the claimed limitations of Applicants' claim 1.

As noted above, '144 fails to teach or suggest the specific rheology enhancers as required by claim 1. Specifically, while '144 discloses combining isododecane with styrene-ethylene-propylene copolymer, no where in '144 is it taught or suggested to use the combination of isododecane, ethylene/propylene/styrene copolymers, and butylene/ethylene/styrene copolymers as a rheology enhancer in its cosmetic composition.

The Morrison and Grollier et al. references fail to overcome the above shortcomings. Specifically, Morrison

discloses a solid or semi-solid hydrocarbon gel for use as an ointment, balm, or salve to treat wounds, burns, or injuries to the skin. The hydrocarbon gel comprises from greater than about 0% to about 99% by weight solid or semi-solid hydrocarbon and from greater than about 0% to about 50% by weight of at least one block copolymer selected from the group consisting of a triblock copolymer; a radial block copolymer; a multi-block copolymer; a diblock copolymer; and mixtures of these polymers. Suitable hydrocarbons for use in the hydrocarbon gel include paraffin wax, petrolatum, synthetic waxes, mineral waxes, vegetable oil waxes, polyethylene waxes, microcrystalline waxes, natural waxes such as carnauba, beeswax, and the like.[1] Suitable block copolymers include rubber-type polymers consisting of styrene monomer units and rubber monomer units, and/or comonomer units; diblock styrene polymers such as styrene-ethylenepropylene, styrene-ethylenebutylene, styrene-butadiene, and styrene-isoprene; and triblock styrene polymers such as styrene/ethylene/butadiene/styrene, styrene/butadiene/styrene, and styrene/isoprene/styrene.[2]

Optionally, a liquid hydrocarbon, such as white mineral oil, can be included in the hydrocarbon gel of Morrison in an amount ranging from about 5% to 75% by weight.[3] Additionally, when the hydrocarbon gel is a solid hydrocarbon gel, the gel may optionally include from about 0.1% to about 50% by weight additional ingredients such as various waxes. Examples of the various waxes include carnauba wax, beeswax, or candellia wax.[4]

---

[1] U.S. 6,340,467 at column 2, lines 26-30.
[2] *Id.* at column 3, lines 17-62.
[3] *Id.* at column 2, lines46-51.
[4] *Id.* at column 4, lines 34-38.

Grollier et al. disclose a sunscreen composition containing at least one oil-soluble agent absorbing UV rays and at least one polyisobutylene. The polyisobutylene has a viscosity-average molecular weight of between 8,000 and 65,000 at ambient temperature. The sunscreen composition can optionally comprise fatty substances such as mineral, animal or vegetable oils or waxes, fatty acids, fatty acid esters such as triglycerides of fatty acids containing from 6 to 12 carbon atoms, fatty alcohols and oxyethylenated fatty alcohols, water, monoalcohols or lower polyalcohols containing from 1 to 6 carbon atoms, or an aqueous alcohol solution. The sunscreen compositions have a higher protection index than that of conventional sunscreen compositions which contain only liposoluble UV screens.

No where is it disclosed to use isododecane in combination with ethylene/propylene/styrene copolymers, and butylene/ethylene/styrene copolymers in the compositions of either the Morrison or Grollier et al. references. Moreover, no where in these cited references is there any disclosure of the use of isododecane as a rheology enhancer. As such, none of the cited references disclose any of the specific rheology enhancers of Applicants' claim 1.

In addition to the disclosure of isododecane as a rheology enhancer, the Office states in the Office action dated April 24, 2006 that the combination of cited references further discloses each and every limitation of claim 1 using the polyisobutylene disclosed in Grollier et al. as the rheology enhancer. Specifically, the Office states that Grollier et al. disclose that the addition of polyisobutylene to a skin care composition has the advantage of protecting human epidermis against UV radiation, and as such, one skilled in the art would be

motivated to use the polyisobutylene in the cosmetic composition of '144.

As noted in M.P.E.P. §2142, in establishing obviousness, the Office must show references that teach all of the claimed limitations along with some motivation or suggestion, either in the references themselves or in knowledge generally available to one skilled in the art, to combine the references and arrive at the claimed subject matter.[5] The mere fact that the references can be combined to arrive at the claimed subject matter does not render the resultant combination obvious, unless the prior art also suggests the desirability of the combination. In re Mill, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). A close reading of the cited references clearly indicates that one skilled in the art would not have been so motivated and, without Applicants' disclosure as a blueprint (which the Office had the benefit of utilizing), such a combination of the '144, Morrison, and Grollier et al. references would not have been made.[6]

---

[5] As further set forth in M.P.E.P. §2143.01, obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either explicitly or implicitly in the reference itself, or in the knowledge generally available to one or ordinary skill in the art.

[6] M.P.E.P. §2142 further provides that in order to reach a proper determination under 35 U.S.C. §103(a), the Examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. Knowledge of Applicants' disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences." The tendency to resort to "hindsight" based upon Applicants' disclosure is often difficult to avoid due to the very nature of the examination process. However, as stated by the Federal Circuit, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned

As noted above, the Office states that one skilled in the art would be motivated to combine the polyisobutylene of Grollier et al. with the '144 and Morrison references simply because Grollier et al. disclose that the addition of polyisobutylene to a skin care composition has the advantage of protecting human epidermis against UV radiation. This generic statement, without anything further, is not sufficient motivation for one skilled in the art, at the time Applicants' invention was made, to combine cited references and arrive at Applicants' invention. Specifically, providing a sunblock agent to protect the skin form sunburns is merely an optional ingredient in the '144 reference. Furthermore, if a sunblock agent is desired for use in the cosmetic composition of '144, the '144 reference provides numerous suitable sunblock agents. As such, why would one skilled in the art, reading the '144 reference, be motivated to use an additional sunblock agent? Additionally, there are a myriad of sunblock agents in the art, many of which could be suitable for use in the cosmetic compositions of '144. What is important is that there is no motivation or suggestion to use the polyisobutylene sunblock agent of Grollier et al. over any of the other enormous number of sunblock agents described in the art.

Moreover, Morrison fails to provide any suggestion or motivation to use the polyisobutylene of Grollier et al. in its composition or in the cosmetic composition of '144. Specifically, Morrison is directed to hydrocarbon gels containing medicinal ingredients useful as an ointments, balms, or salves for wounds. No where in Morrison is the purpose of protecting the skin from UV radiation even suggested.

---

from the prior art. Grain Processing Corp. v. American-Maize-Products, Co., 840 F.2d 902, 904 (Fed. Cir. 1988).

With all due respect, it appears that the Office has used impermissible hindsight analysis and reconstruction when combining the '144, Morrison, and Grollier et al. references. There is simply no suggestion or motivation to do so provided in the references themselves or in the knowledge of one skilled in the art as required for a *prima facie* case of obviousness under M.P.E.P. §2143. As such, claim 1 is patentable over '144 in view of Morrison and further in view of Grollier et al.

Claims 3, 5-13, 15-18, 21, and 27 depend directly or indirectly from claim 1. As such, claims 3, 5-13, 15-18, 21, and 27 are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

2. Rejection of claims 1-13, 15-23, and 25 under 35 U.S.C. §103(a).

Claims 1-13, 15-23, and 25 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Krzysik et al. (U.S. 6,149,934) in view of EP 0497144 ('144).

Amended claim 1 is discussed above.

U.S. 6,149,934 ('934) discloses an absorbent article having a bodyside liner that includes a lotion formulation for reducing the abrasion of the skin caused by the liner and for improving skin health. The lotion formulation comprises from about 5 to about 95 weight percent of an emollient, from about 5 to about 95 weight percent of a wax, and, optionally, from about 0.1 to about 25 weight percent of a viscosity enhancer.

As noted by the Office, the '934 reference fails to teach or suggest the rheology enhancers as required in Applicants' claim 1. In an attempt to find each and every element of claim

1 as required by the M.P.E.P. for a determination of *prima facie* obviousness, the Office cites the '144 reference for combination with '934.

The '144 reference is discussed above.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art references must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the references, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under number (1) above, as the cited references, alone or in combination, have not taught or suggested all of the claimed limitations of Applicants' claim 1.

As noted above, '934 fails to teach or suggest each and every limitation of claim 1. Specifically, no where in the '934 reference is it taught or suggested to use the specific rheology enhancers of claim 1 in the lotion formulation of '934. At best, the suitable viscosity enhancers disclosed in the '934 reference include polyolefin resins, lipophilic/oil thickeners, ethylene/vinyl acetate copolymers, polyethylene, silica, talc, colloidal silicone dioxide, zinc stearate, cetyl hydroxyl ethyl cellulose and other modified celluloses, and the like, and mixtures thereof.[7]

The '144 reference fails to overcome the above shortcomings. As noted above, the '144 reference fails to teach or suggest the rheology enhancers required in claim 1. Specifically, while the '144 reference discloses the use of

[7] U.S. 6,149,934 at column 10, lines 57-62.

isododecane in combination with styrene-ethylene-propylene copolymers, no where in the '144 reference is it taught to combine isododecane with ethylene/propylene/styrene copolymers, and butylene/ethylene/styrene copolymers as required in the topical ointments of Applicants' claim 1. As such, neither of the cited references disclose each and every limitation required by claim 1, and claim 1 is patentable over the cited references.

Claims 3, 5-13, and 15-22 depend directly or indirectly from claim 1. As such, claims 3, 5-13, and 15-22 are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

Claim 23 is similar to amended claim 1 and further requires the topical ointment to comprise from about 0.1% by total weight of the ointment to about 10% by total weight of the ointment of a particulate material, and from about 0.1% by total weight of the ointment to about 10% by total weight of the ointment of a low HLB surfactant. Claim 23 is patentable for the same reasons as claim 1 set forth above, as well as for the additional elements it requires. Furthermore, claim 25, which directly depends from claim 23, is patentable for the same reasons as claim 23 set forth above, as well as for the additional elements it requires.

3. Rejection of claims 1-6, 10-13, and 19-22 under 35 U.S.C. §103(a).

Claims 1-6, 10-13, and 19-22 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Krzysik et al. (U.S. 6,287,581) in view of EP 0497144 ('144).

Claim 1 is discussed above.

U.S. 6,287,581 ('581) discloses a skin barrier enhancing body side liner on an absorbent article comprising a lipid-enriched hydrophobic composition. The lipid-enriched hydrophobic composition comprises from about 0.1 to about 95 weight percent natural fats or oils, from about 0.1 to about 10 weight percent sterols and sterol derivatives, from about 0.5 to about 20 weight percent of humectant, from about 1 to about 20 weight percent of water-in-oil emulsifying surfactant/surfactant combination having an HLB range from about 3 to about 6, from about 5 to about 95 weight percent emollient, from about 5 to about 95 weight percent wax, and from about 1 to about 25 weight percent viscosity enhancer.

As noted by the Office, the '581 reference fails to teach or suggest the rheology enhancers as required in claim 1. In an attempt to find each and every element of claim 1 as required by the M.P.E.P. for a determination of *prima facie* obviousness, the Office cites '144 for combination with '581.

The '144 reference is discussed above.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art references must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the references, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under number (1) above, as the cited references, alone or in combination, have not taught or suggested all of the claimed limitations of Applicants' claim 1.

As noted above, '581 fails to teach or suggest each and every limitation of claim 1. Specifically, no where in the '581 reference is it taught or suggested to use the specific rheology enhancers of claim 1 in the lipid-enriched hydrophobic composition of '581. At best, the suitable viscosity enhancers disclosed in the '581 reference include polyolefin resins, polyolefin polymers, ethylene/vinyl acetate copolymers, polyethylene, and the like, and mixtures thereof.[8]

The '144 reference fails to overcome the above shortcomings. As noted above, the '144 reference fails to teach or suggest the rheology enhancers required in claim 1. As such, neither of the cited references discloses each and every limitation required by claim 1, and claim 1 is patentable over the cited references.

Claims 3, 5-6, 10-13, and 19-22 depend directly or indirectly from claim 1. As such, claims 3, 5-6, 10-13, and 19-22 are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

[8] U.S. 6,287,581 at column 10, lines 25-29.

KCC 4982.1 (K-C 19,834)
PATENT

**CONCLUSION**

In view of the above, Applicants respectfully request favorable reconsideration and allowance of all pending claims. The Commissioner is hereby authorized to charge any fee in connection with this Amendment D to Deposit Account Number 19-1345 in the name of Senniger, Powers, Leavitt & Roedel.

Respectfully submitted,

Christopher M. Goff, Reg. No. 41,785
SENNIGER POWERS
One Metropolitan Square, 16th Floor
St. Louis, Missouri 63102
(314) 231-5400

CMG/JMB/dhm

Via facsimile (571)273-8300